

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.501 OF 2010

Shri Saraswati Co-Operative Housing .. Applicants
Society Ltd. & Ors.

Versus

Ganesh Ghisulal Saungur & Ors. .. Respondents

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Mr.Atul Damle, Senior Advocate with Mr.Hitesh P. Vyas and
Mr.Chandrashekhar Yadav for the Petitioners.

Mr.Aslam F. Shaikh with Mr.F.M.Shaikh for the Respondent
No.2.

Mr.Rohit Pawaskar for the Respondent No.3.

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CORAM: BHARATI DANGRE, J.

RESERVED ON : 03rd DECEMBER, 2021

PRONOUNCED ON : 29th MARCH, 2022

JUDGMENT:-

1. The present Revision Application was admitted on
23/03/2022, with the following order;

“An arguable case is made out in view of the judgment of
the learned Supreme Court in the case of **Suprabhat Co-
operative Housing Society Ltd. & another vs. Span
Builders & anr.**, reported in 2002(6) Bombay C.R. 257.

Hence, Admit. Hearing expedited. Interim relief in terms of prayer clause (b).”

2. Heard the learned senior counsel Shri Atul Damle for the applicants, the learned counsel Mr.Aslam Shaikh for Respondent No.2 and the learned counsel Mr.Rohit Pawaskar for Respondent No.3.

The brief point, which arises for consideration in the present Revision Application is, whether a suit is maintainable against a Co-Operative Housing Society without compliance of Section 164 of the Maharashtra Co-Operative Societies Act, 1960 (for short, **“the MCS Act”**).

3. The brief background in which the question arose can be culled out as under :-

The suit property is plot Nos.12 and 13 admeasuring 7410.28 sq.ft. in final Plot No. 30/2 situated in Shivaji Nagar (Bhamburda) City Survey No.1760.

Applicant No.1 is the co-operative society registered under the MCS Act. Applicant No.2 is the Chairman of the society whereas applicant Nos.3 and 4 are it's office bearers. Respondent No.3 is the lessee/member of the society in respect of the subject plot Nos.12 and 13 whereas the respondent No.1 and 2 are the individuals, claiming ownership over the suit property.

It is the claim of the applicant society that the suit property was purchased by it, under two separate registered

sale deeds dated 24/09/1962 executed, in the office of the Sub-Registrar, Haveli No.II at serial No.1506 and 1507 of 1962, from Shri Hari Sadashiv Bhat, Shri Ram Sadashiv Bhat and Shri Keshav Sadashiv Bhat, the original owners of the property and the suit property is the part of the same. It is the business of the society to provide plots belonging to the said society, to it's members on lease.

4. Respondent Nos.1 and 2 filed a suit bearing Special Civil Suit No.855 of 2007 against the society and it's office bearers for a declaration and injunction in respect of the suit property situated at plot Nos.12 and 13, and praying that the lease agreement dated 05/09/2006, bearing registration No.6430/2006), entered between the applicant No.1 and respondent No.3 may be declared null and void and it be cancelled. It was also prayed that permanent injunction may be granted in favour of respondent Nos.1 and 2, restraining the applicants from claiming any right of whatsoever nature in respect of the said plots. The case of plaintiffs i.e. the respondent Nos.1 and 2 herein, is that they have purchased the suit property from one Shri Nadkarni (since deceased) by a registered sale deed on 09/12/2005.

5. In the said proceedings, the applicants raised objection to the maintainability of the suit under Section 164 of the MCS Act.

In the said suit, the applicants filed an application and prayed that it has already filed an application at Exh.26

challenging the maintainability of the suit and, therefore, preliminary issue was requested to be framed. Respondent Nos. 1 and 2 filed their say to the said application.

The learned Judge, Senior Division, Pune, after hearing both the sides, and after considering the evidence on record, delivered the judgment and order dated 20/07/2009, thereby declaring that the Court has jurisdiction to proceed with the suit, even in absence of notice under Section 164 of the MCS Act.

6. The learned senior counsel Mr.Damle would invite my attention to certain proceedings parallelly running in the background of the said events and this include institution of a suit by Shri Nadkarni vide dispute SR/ABN/12 of 1980 for declaration and injunction qua the suit property. The order was passed by the Co-Operative Court in the said dispute, holding that Nadkarni Enterprises are owners and allottees of Plot No.12 and 13, with bungalow thereon and they have right to recover rent from the tenants amongst other directions.

Against the said order, applicant No.1-society preferred Appeal No.328 of 1985 before the Maharashtra State Co-Operative Appellate Court. The said appeal was partly allowed and the society through it's liquidator was directed to allot and deliver possession of Plot Nos.12 and 13 alongwith structure erected thereon jointly to Nadkarnis in their individual capacity as members of the society, subject to payment of cost of the plot alongwith structure thereon.

7. Further sequence of event averred is that, Dattatraya Nadkarni and Nadkarni Enterprises filed Dispute No.390 of 2008 in the Co-Operative Court, Pune. The dispute challenged the Resolution No.2 passed by the Managing Committee of the applicant-society, thereby admitting respondent No.3 herein to the membership of the society and allotting Plot No.15(old) 12 and 13 (new) i.e. suit plot in the society contending that the Resolution is in contravention of the judgment and order dated 29/12/1990 passed by the Co-Operative Appellate Court in Appeal No.328 of 1985. It is further averred that application at Exh.5 was filed, praying for interim relief and the same was rejected and, therefore A.O. No.101 of 2009 was filed.

The order was passed on 02/12/2009, allowing the A.O.121 of 2009 and respondent No.3 herein was restrained from exercising his rights of membership in the society during the pendency of Dispute No.390 of 2008.

8. It is further averred that the society approached this Court by filing Writ Petition No.10824 of 2009 challenging the order dated 02/12/2019 passed by the Co-Operative Appellate Court in A.O. No.121 of 2009 on the grounds mentioned therein. This Court, vide order dated 16/10/2012, allowed the petition and directed the parties to maintain status-quo in relation to the two plots, being plot Nos.15 (old) and 12 and 13(new) in the property belonging to the society. On 11/11/2016, Dispute No.390 of 2008, filed by Nadkarnis, came to be withdrawn.

9. Per contra, the learned counsel for the respondents would submit that late Shri D.M.Nadkarni purchased the larger plot as a Chairman of Saraswati Co-Operative Society vide Agreement Nos.1506 and 1507 of the year 1962 and the Co-Operative Court, Poona allowed the dispute of M/s.Nadkarni Enterprises, but the Appellate Court substituted the order of the Co-Operative Court in Dispute No.12 of 1980 and gave certain directions to the society/the liquidator with respect to the said plot. The case of the respondents is, late Shri D.M.Nadkarni executed a registered sale deed in respect of the said plot in favour of respondent Nos.1 and 2 in the year 2005 and to be precise, on 09/12/2005 whereas the applicant society executed a lease deed in favour of respondent No.3 in respect of the suit plot of the society vide a registered deed dated 05/09/2006.

Special Civil Suit No.855 of 2007 was filed by respondent Nos.1 and 2 against respondent No.3 and the applicant society in which the application was filed under Section 9A, which was rejected on 20/07/2009. This being a common event, the fact of passing of the impugned order is not disputed by the learned counsel for the respondents. It is submitted that Shri D.M.Nadkarni expired on 30/08/2010.

10. In the above sequence of events, the subject matter of challenge is the order passed below Exh.51, where the preliminary issue raised by the applicants about the maintainability of the suit was framed in the following words :-

“Whether the suit is hit by section 164 of Maharashtra Co-Operative Societies Act for want of statutory notice?”

The plaintiffs pleaded that the suit property was belonging to Dattatraya Mahabaleshwar Nadkarni. In the suit property, there was an old structure constructed in stone, bricks, soil, which was occupied by the tenants. There was some dispute between the plaintiffs and Shri Nadkarni in respect of property of plot No.9 and the plaintiffs filed Special Civil Suit No.478 of 2022 and as per the decree in favour of the plaintiffs, the defendant i.e. Shri Nadkarni executed a sale deed in favour of the plaintiffs on 09/12/2005 and it was claimed that the plaintiffs are in use, occupation and possession of the property. The case of the plaintiffs is, at the time of registration of sale deed, the defendants never raised any objection for the transaction between the plaintiffs and Shri Nadkarni and they had given no-objection certificate for effecting the transaction of plot Nos.9, 12 and 13. The plaintiffs specifically assert that the suit property was never belonging to defendant No.3-society, but it was always belonging to Shri Nadkarni, but on an attempt made by defendant No.1 (respondent No.3 to the application) to restrain them from entering the suit property and on gaining knowledge that the society and its chairman executed a lease agreement in his favour, plaintiffs filed the suit seeking a declaration that the lease deed executed between defendant No.1 and the society is null and void.

Defendant No.1-Umesh Kothawade and the society and its office bearers contested the claim in the suit and apart from merits, raised a preliminary ground about issuance of

statutory notice prior to filing of the suit under Section 164 of the MCS Act.

On merits, it was contended that Shri Nadkarni was not the owner of the said property, but the Co-operative Housing Society i.e. defendant No.2 is the owner of the suit property and it is business of the society to allot property to its members on lease. It was also pleaded that the property was purchased by the society from the original owners i.e. Shri Hari Sadashiv Bhatt, Shri Ram Sadashiv Bhatt and Shri Keshav Sadashiv Bhatt under the registered deed and that is how the society became the full owner of the property.

11. The issue which arises in the background of the said facts and framed as preliminary issue as to whether the suit is maintainable in absence of a notice being issued under Section 164. At this stage, it is, therefore, relevant to reproduce Section 164 of the MCS Act.

“164. No suit shall be instituted against a society, or any of its officers, in respect of any act touching the business of the society, until the expiration of two months next after notice in writing has been delivered to the Registrar or left at his Office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims, and the plaint shall contain a statement that such notice has been so delivered or left.”

12. The position of law on the said aspect is no more *res integra* and the learned Single Judge of this Court (Dr.D.Y.Chandrachud, J. as he was then) in case of **Suprabhat Co-operative Housing Society Ltd. & Anr. vs. Span Builders & Anr.**¹ was confronted with an order passed by the learned

¹ 2002(6)Bom.C.R.257

Judge, who had dismissed the application filed on behalf of the applicants who claimed that the plaint be rejected under the provisions of Order 7 Rule 11(d) of the C.P.C. on the ground that prior notice to institution of notice under Section 164 of the MCS Act has not been given, the applicant being a Co-Operative Housing Society duly registered under the MCS Act. The objects of the society being to buy or taken on lease a plots and to construct flats for allotment to the members of the society for their authorised use. It was recorded that it is not uncommon in such cases where the society is empowered to do all things necessary or expedient for the attainment of the objects of the society specified in the bye-laws.

While dealing with the said issue, in the wake of Section 164, the following observations are relevant :-

“7. Section 164 provides that no suit shall be instituted against a society, or any of its office bearers in respect of any act touching the business of the society, until after the expiration of two months after the stipulated notice has been delivered. The notice is to specify the cause of action and the other particulars which are set out in Section 164. The plaint is to then contain a statement that a notice was so delivered.

8. The expression "touching the business of the society", which is employed in Section 164 has also been used in Section 91 of the Act. Section 91, it would be material to note, falls in Chapter IX of the Act which is entitled "Statement of Disputes". Section 91 provides that notwithstanding anything contained in any other law for the time being in force, any dispute touching the constitution, elections of the committee or its officers other than elections of committees of specified societies including its officers conduct of general meetings, management or business of a society shall be referred by any of the parties to the dispute to a Co-operative Court if the parties thereto are one or the other of the parties specified in Clauses (a) to (e) of the section. The expression "touching the business of the society" came up for consideration before the Supreme Court in ([Deccan Merchants v. Dalichand](#)) reported in 1968 Bom.L.R. 418.

The Supreme Court held that in the context of Section 91, the expression "touching the business of the society" would not mean the affairs of a society because election of office-bearers, conduct of general meetings and management of a society could be treated as affairs of a society. Therefore, the Court was of the view that the word "business" has been used in a narrower sense and it means the actual trading, commercial or other similar business activity of the society which the society is authorised to enter into under the Act and the Rules and its bye-laws. In the present case, the Court is concerned with the construction to be placed upon the meaning of the expression "touching the business of the society" not in the context of Section 91 but in Section 164. Nevertheless, the principle which has been laid down by the Supreme Court must illuminate the interpretation to be placed by this Court on the expression-"touching the business of the society". In that context, it would be necessary to advert to the following observations of the Supreme Court in *Deccan Merchants* (supra):

"The question arises whether the dispute touching the assets of a society would be a dispute touching the business of the society. This would depend on the nature of the society and the rules and bye-laws governing it. Ordinarily, if a society owns buildings and lets out parts of buildings which it does not require for its own purpose it cannot be said the letting out of those parts is a part of the business of the society. But it may be that it is the business of a society to construct and buy houses and let them out to its members. In that case letting out property may be part of its business. In this case, the society is a co-operative bank and ordinarily a co-operative bank cannot be said to be engaged in business when it lets out properties owned by it. Therefore, it seems to us that the present dispute between a tenant of a member of the bank in a building which has subsequently been acquired by the bank cannot be said to be a dispute touching the business of the Bank, and the appeal should fail on this short ground.

(emphasis supplied)"

13. Another decision which has crystallized the aforesaid position is in case of *Jijamata Sahakari Sakhar Karkhana Ltd.*,

Dusarbid Vs. Sukhadeo Rambhau Fulzade & Anr.² wherein the following observations are made :-

8. The mandatory requirements of section 164 of the said Act serves policy of law and a public purpose to protect Co-operative Societies from expensive; avoidable and lengthy litigation. The object of pre-suit statutory notice is to alert the noticee-society about the proposed suit so that it may through its responsible officer reply to the notice with a view to avoid litigation or to negotiate just settlement or, at least, have Courtesy to tell the prospective plaintiff as to why his claim is being resisted. It is frequently experienced that notices entitled to pre-suit statutory notices according to law in such cases are often unresponsive and render the salutary provision an empty ritual by their sheer inaction. Three Judge Bench of the Apex Court in the case of *Salem Advocate Bar Association, Tamil Nadu v. Union of India*, (2005) 6 SCC 344, while making observation about requirement of pre-suit statutory notice under section 80 of Civil Procedure Code held that the notice period of two months have been provided so that Government shall examine the claim put up in the notice and has sufficient time to send a suitable reply. The underlying object is to curtail the litigation; area of dispute and controversy. Wherever the statutory provision requires service of notice as a condition precedent for filing of the suit and observing prescribed period thereof, noticee concerned is expected to deal with it, so as to send reply. The provision casts an important and implied duty upon the noticee concerned to send an appropriate reply to such notice.....

9. The Full Bench of the Bombay High Court in *Vasant Ambadas Pandit v. Bombay Municipal Corporation*, 1981 Mh.L.J (FB) 706 = AIR 1981 Bombay 394, held that “ in our opinion, the true legal position in this behalf is that no suit can be instituted without service of the notice if such service of the notice is required statutorily as a condition precedent. The giving of notice is a condition precedent to the exercise of jurisdiction. “Pre-suit statutory notice is

² 2010(5)Mh.L.J.431

mandatory but it is capable of being lawfully waived by the party-defendant as it is procedural requirement but undoubtedly, the waiver has to be established by the plaintiff and once the plea of waiver raised by the plaintiff is tried and proved, then upon such waiver the Civil Court gets jurisdiction to entertain and try the suit. A party defending such suit which is instituted without service of pre-suit statutory notice has right to object at earliest opportunity that the suit could not have been instituted without the mandatory compliance of statutory requirements. On this premise, it is choice of the defendant to raise preliminary objection as to jurisdiction of the Court to entertain the suit or to waive the objection of procedural requirement by continuing to participate in the suit by filing written statement, adjournment application etc. and otherwise participating in the further continuation of proceedings in the suit....

(b) An objection as to jurisdiction of the Court to entertain and try the suit ought to be taken at preliminary stage of the suit at or before settlement of the issues. The defect as to non-compliance of section 164 of the Act is not such a defect which can absolutely take away inherent jurisdiction of the Court to decide plea of waiver raised by the plaintiff and if finding as to waiver is recorded in favour of the plaintiff the Civil Court may proceed to try the suit on merits and pass the decree. The mere absence of pre-suit statutory notice would not affect the fundamental jurisdiction of the Civil Court to decide the question of waiver and to proceed with the suit to pass the decree since it is a procedural defect. In a given case, if permitted by the Court the plaintiff may opt to withdraw from the suit and cure the defect by offering to issue a pre-suit statutory notice in writing in accordance with law and then to file a suit. Such permission if sought by the plaintiff may be considered by the Court when the objection is raised at preliminary stage of the suit.....”

The learned senior counsel Shri Damle has placed reliance on two more decisions of this Court in the case of

*Vardhman Developers Ltd. Vs. Borla Co-Operative Housing Society Ltd. & Ors.*³ and *Tirupati Ginning & Pressing Factory Vs. M/s.Balaji Ginning & Pressing Industry & Ors.*⁴, having a somehow similar view.

Per contra, the learned counsel for the respondents has placed reliance upon a decision of a learned Single Judge in the case of *Kumar Tarachand Laungani Vs. Deepak Tarachand Laungani & Anr.*⁵ to support his submission that the notice is required to be issued only when the suit is to be instituted against a society in respect of an act touching the business of the society.

14. The neat question of law, which therefore arises in the present application is whether the suit filed by the plaintiffs was touching the business of the society.

The bye-laws of the applicant society, as approved by the competent authority, are placed on record and on it's perusal, the objective of the society can be discerned as, to purchase land/plots and construct houses for it's members.

In furtherance of the said object, the land came to be allotted by the society to Mr.Umesh Kothawade (respondent No.3) and the lease deed executed in his favour clearly states that Shree Saraswati Co-Operative Housing Society Ltd., the lessor, has purchased plot No.30/1 admeasuring about 35,000 sq.ft. and plot No.30/2 admeasuring about 40,000 sq.ft., from the Town Planning Scheme No.I, Bhamburda, Pune city, by sale

3 2014(2) Bom.C.R.420

4 2008(4) ALL MR 578

5 2016(7) ALL MR 563

deeds dated 24/09/1962, which are registered in the office of Sub-Registrar, Haveli No.II from the erstwhile owner thereof, namely, Hari Bhat, Ram Bhat and Keshav Bhat and that is how the society has become full and absolute owner of the said plots and came in possession of the same.

The lease deed also contain a recital to the following effect:-

“AND WHEREAS the plot Nos.12 and 13 from the said layout alongwith structures thereon, which are more particularly described in the Schedule B herein, remained with the Lessor society and the Lessor society has upto today neither transferred or conveyed or given on lease the said plots to anybody and the ownership and possession of the said plot is vested with the Lessor society alone.

AND WHEREAS the Lessor has by resolution No.2 passed in the Managing Committee of the Lessor society which was held on 02/09/2006, in pursuance of and as per powers given to it by the resolution No.11 passed in the General Body Meeting of the Lessor society which was held on 06/082006, inter alia admitted the Lessee as a member of the Lessor society and has allotted and agreed to transfer the said lots to the Lessee for total consideration of Rs.2,00,000.00 and agreed to execute and get registered the lease deed of the said plots in favour of the Lessee, as a step towards such transfer of said plots.”

15. In the light of the aforesaid, it is apparent that the dispute in respect of plot Nos.12 and 13, is touching the business of the society, being purchasing plots and making it available to it's members. Respondent Nos.1 and 2 instituted Special Civil Suit No.855 of 2007 impleading the society and it's office bearers as defendants, seeking a declaration and injunction in respect of plot No.12 and 13 of Shri Saraswati Co-operative Housing Society Ltd. and praying that the lease agreement dated 05/09/2006 entered between the petitioner

No.1 society and defendant No.3 may be declared null and void and the same may be cancelled.

The objection was raised about the maintainability of the said suit, in absence of the issuance of mandatory notice as contemplated under Section 164.

16. The learned Judge, however, failed to consider the mandate of Section 164 and merely because the plaintiff is not member of the society, held that the bar shall not come into force and turned down the preliminary issue. The effect of non-compliance of the mandate under Section 164 has been well settled in case of **Suprabhat Co-operative Housing Society Ltd.** (supra) and since the plot in question in respect of which the suit is filed, is the plot leased out to respondent No.3 by the society, is clearly a part of the business of the society, the suit shall not lie in absence of the notice being issued.

17. The learned counsel for the respondents has placed reliance upon the judgment of the Single Judge of this Court in the case of **Kumar Tarachand Laungani** (supra).

I have gone through the said decision and in the peculiar facts, where the dispute was in between two brothers in respect of flat in the Co-operative Housing Society, the provision of Section 164 was held to be applicable, since the primary relief sought by the plaintiff was against defendant No.1-his brother and it did not concern the society, but the society was joined as a party defendant only to obtain consequential directions arising out of outcome in suit and,

therefore, suit cannot be treated as suit instituted against society in respect of an act touching business of society and no notice as contemplated under Section 164 would be necessary. The said decision is distinguishable on facts.

18. In the wake of the above, since the plot in respect of which the suit is filed, belongs to the society and is allotted to one of its member, the suit is necessarily touching the business of the society and, therefore, must fail in absence of the mandate of Section 164 of the MCS Act being followed.

18. The impugned order passed by the learned Civil Judge, Senior Division, Pune holding that the Court has jurisdiction to proceed with the suit, is, therefore, quashed and set aside.

As already noted, while admitting the Civil Revision Application, the proceedings in the suit came to be stayed on 23/03/2011 and the interim order is in operation till today.

Since the suit is held to be not maintainable in absence of the notice being issued under Section 164 of the MCS Act, the suit is dismissed, as not maintainable. However, it shall not preclude the plaintiffs from instituting a fresh suit, after issuance of notice under Section 164 of the MCS Act.

19. The Civil Revision Application stands disposed off.

(SMT. BHARATI DANGRE, J.)